SUPREME COURT, U.S.

No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit, entered in the above case on June 15, 1955.

OPINIONS BELOW

The opinion of Judge Nordbye[1] denying respondent's motion to suppress evidence (Appendix, *infra*, pp. 27–34) has not been reported. The majority and dissenting opinions of the Court

[1] Judge Nordbye, District Judge for the District of Minnesota, was specially appointed by Chief Justice Vinson to try this case in the Northern District of Illinois. (R. 116–117.)

of Appeals (Appendix, *infra*, pp. 35–69) are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on June 15, 1955 (Appendix, *infra*, pp. 69–72), and a petition for rehearing, filed within the period allowed by the Court of Appeals, was denied on August 18, 1955. On September 16, 1955, by order of Mr. Justice Reed, the time for filing a petition for certiorari on behalf of the United States was extended to and including October 17, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

The district court, after hearing, found that respondents' alleged "voluntary disclosure" of their unpaid taxes was lacking in good faith, was not complete, and "had only one purpose and that was to mislead and misinform the Government agents of the true facts." The Court of Appeals reversed, holding that respondents had made a valid voluntary disclosure and that the use at the trial of evidence obtained through such disclosure constituted a violation of the Fifth Amendment.

The question is whether the Court of Appeals erred (a) in misapplying the so-called "voluntary disclosure" policy of the Treasury Department to the circumstances of this case, and (b) in misap-

plying the standards governing review of the trial court's findings of fact.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY

* * * * *

(b) *Fraud.* If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and

paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2). (26 U. S. C. 1952 ed., Sec. 293.)

STATEMENT

On March 14, 1952, a two-count indictment was filed in the United States District Court for the Northern District of Illinois charging that respondent Shotwell Manufacturing Company, a corporation, and the three individual respondents as officers thereof, wilfully attempted to evade a large part of the corporation's income taxes for 1945 and 1946, respectively, by filing fraudulent corporate income tax returns.[2] (R. 5–7.) The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1945)	$561,064.42	$370,638.95	$738,210.65	$534,288.89
Count II (1946)	1,202,917.18	457,012.98	1,526,490.47	579,970.83

[2] Shotwell Manufacturing Company manufactured candy and marshmallows. Sullivan, who had been attorney for the firm, and Cain, a millionaire real estate man, reorganized the business in 1941 and acquired a controlling stock interest. Cain became president, and Sullivan was general counsel with a salary of $30,000 a year. (R. 747–748, 971, 1764–1772, 1791–1793, 2541–2542, 2568–2569, 2629–2630, 2634–2637, 2647–2650, 2660–2661.) Huebner, a long-time employee of the corporation, became vice-president and general superintendent in charge of operations. He owned less than 1% of the stock. (R. 748, 1707, 1772, 1791, 2542, 2637.)

The Government furnished a bill of particulars which alleged that the unreported income resulted from the failure of the corporation to record on its books premiums received on certain sales of merchandise over and above the recorded invoice price, and from its complete failure to record certain other sales. (R. 8–9.) After a trial lasting five weeks, the jury returned its verdict of guilty as charged after short deliberation. (R. 3000.) The corporation was fined $20,000. (R. 3012–3013, 3221.) Cain was sentenced to imprisonment for three years and fined $10,000. (R. 3015–3016, 3224.) Sullivan was sentenced to imprisonment for three years and fined $5,000. (R. 3075, 3256–3257.) Huebner was sentenced to imprisonment for three years and fined $2,000. (R. 3019, 3222.)

The so-called voluntary disclosure policy of the Treasury Department was publicly announced in 1945 and was withdrawn in January 1952. (R. 3125–3126, 3142.) The policy provided generally that in cases in which taxpayers made voluntary disclosures of intentional evasions before an investigation had been begun, the Treasury Department would assess the tax deficiency plus civil penalties, including the 50% fraud penalty, but would not refer the case to the Department of Justice for criminal prosecution. (R. 3136–3137.) In two of the most definitive pronouncements of Treasury Department officials on the subject it was stated that taxpayers must cut "square

corners" with the Government (R. 3140), and that the voluntary disclosure policy assumed "that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability" (R. 3141). These two statements, one by J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, the other by Secretary of the Treasury Snyder, were issued in May 1947. (R. 3132, 3140.)

Early in 1948 respondents informed a Treasury official that the corporation had failed to report large black market currency receipts from sales of candy to one David Lubben, and in the summer of that year they submitted schedules purporting to show that the corporation had received approximately $380,000 in this manner during 1944, 1945 and 1946. None of these receipts had been recorded in the corporation's books or reported in its tax returns for those years. (R. 1844–1845, 1846.)

After the indictment had been returned respondents filed two motions to dismiss, alleging that they had made a voluntary disclosure and were entitled to immunity from prosecution. (R. 11–12, 31–32, 612–614.) Both motions were denied. (R. 90–99, 616–618.) Respondents also filed a motion to suppress all evidence obtained from them subsequent to the alleged disclosure on the ground that prosecutive use of evidence obtained through a promise of criminal im-

munity constitutes a violation of constitutional rights. (R. 120–127.) After a three day hearing at which both respondent Cain and Busby, the accountant who had advised the alleged disclosure and who had prepared the documents submitted in behalf of the corporation, testified at length, the motion was denied. (R. 150–448.) The evidence at the hearing was in sharp conflict on many points, and Judge Nordbye stated at the close that he felt it would be inappropriate to express his opinion as to the credibility of the witnesses and the good faith of respondents prior to trial, and he reserved the right to file findings of fact and conclusions of law upon completion of the trial. (R. 447–448.) After verdict Judge Nordbye filed a memorandum (Appendix, *infra*, pp. 27–34) in which he found as a fact that respondents' alleged disclosure was completely lacking in good faith and that they had been in no way misled by representatives of the Government.[3] Pointing out that the jury's verdict of guilty necessarily implied a finding that respondents, far from cooperating in a determination of the corporation's taxes, had intended to deceive the Government by the alleged disclosure, he said (Appendix, *infra*, p. 34):

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[3] In view of this, Judge Nordbye found it unnecessary to determine whether the alleged disclosure had been made before the Government had begun an investigation of the corporation's returns. (Appendix, *infra*, p. 34.)

> What a travesty it would be if, under such circumstances, immunity should be granted to the defendants because of the alleged disclosure which had only one purpose and that was to mislead and to misinform the Government agents of the true facts. False statements and fraudulent representations made to Government agents under the pretense of a voluntary disclosure can never constitute the basis for immunity from criminal prosecution under any possible interpretation of the so-called voluntary disclosure doctrine.

The evidence to support Judge Nordbye's findings may be summarized as follows:[4]

During the period when David Lubben was paying cash premiums over and above the invoice price for merchandise received from the corporation, Cain and Sullivan had impressed upon him that they were not paying taxes on this income and that no records should be kept of the cash payments. (R. 860–863, 920–922.) Sometime in the early part of 1948, however, Cain discovered, to his surprise, that Lubben had recorded all his over-the-ceiling cash pay-

[4] Some of the following facts are taken from the record of the hearing on the motion to suppress; others are taken from the trial evidence. In passing upon the propriety of a ruling such as this, the reviewing court will consider the whole record, not merely that portion prior to the ruling. *Carroll* v. *United States*, 267 U. S. 132, 162; *Rent* v. *United States*, 209 F. 2d 893, 896 (C. A. 5th).

ments.[4] (R. 866.) Early in February Cain sent Hufebner to pick up these records in order to "check their records" against Lubben's (R. 867), but the latter, on advice of his attorney, Davidson, refused to surrender the originals until he had photostats made (R. 864–870, 1316–1321). About the same time, Cain sent Busby, the accountant, and Graflund, the corporation's comptroller, to Lubben's plant to examine his books in connection with a $50,000 loan Lubben had requested. Graflund had further instructions, "to pick up whatever papers might be helpful to the company, personal memoranda, or anything else that might be helpful," without Lubben's knowledge.[5] (R. 1757–1758, 1773.)

During this visit Busby first learned of the cash premiums.[6] (R. 168–170.) He promptly spoke to Cain and Sullivan, who told him that all the receipts had been spent for raw materials; that they had not kept records of either the receipts or the expenditures because they did not wish to reveal violations of O. P. A. regulations; and that

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[4] Lubben's own tax returns had been under investigation by the Treasury Department as early as November 1945. (R. 335, cf. also 1059–1061.)

[5] Busby and Graflund placed this visit in January 1946. (R. 1757, 1825.) Lubben placed it in February. (R. 1207.)

[6] When Busby had prepared the corporation's returns for 1945 and 1946 he was given to understand that all receipts were recorded in the books and that there had been no violation of Office of Price Administration regulations. (R. 1822–1825.)

they had not reported the receipts as income because they considered the corresponding expenditures deductible and the whole series of transactions a wash-out tax-wise. Busby told them that the Commissioner of Internal Revenue would not allow deductions for the over-the-ceiling expeditures, and, knowing of Chief Counsel Wenchel's statement on the voluntary disclosure policy, he advised that the matter be disclosed. (R. 170–175, 204–207, 209–211, 213–214, 225–227, 248.)

In a series of conferences beginning about March 15, 1948, Chief Deputy Collector Sauber was advised of the above explanations, and he was told by Cain that it would be extremely difficult to prepare amended returns because no records had been kept of the over-the-ceiling receipts and payments and because the payments for raw materials had been made to "faceless" men who were unknown to respondents. (R. 224–249, 265, 282–285, 291, 299, 2580.) Cain stated that the corporation would immediately pay any tax the Government claimed, but that it would probably at a later date contest the Commissioner's refusal to allow deductions for its over-the-ceiling expenditures. (R. 232, 252, 1948.) Since the statement made to him clearly indicated lack of wilful intent to evade the corporation's taxes (see R. 295), Sauber told Cain that it was "strictly a civil case" and that there would be no publicity. At

no time did he assure Cain and Busby that they had made a valid voluntary disclosure. (R. 285–291.) He advised them that they should reconstruct both the receipts and the expeditures as accurately as they could and that an agent would then audit the corporation's books to determine the taxes due. (R. 282–285.)

Busby's subsequent exhaustive reconstruction, assisted by respondents and the staff of the corporation (R. 182–187, 232–233), resulted in a summary which revealed the receipt of approximately $380,000 in cash overages from Lubben for 1944, 1945 and 1946.[8] When it came to the countervailing expenditures, Cain testified that no one could recall the men (whom he characterized as "faceless") to whom these payments had been made (R. 208, 212, 223–224, 244, 249), so Cain quickly wrote down on a slip of paper a number of meaningless "plug" figures representing disbursements for raw materials,[9] and these were used by Busby to complete his summary (R. 216–217, 233–234, 258–268). The result was a credit balance of $6,000 which, according to respondents, had actually been reported in the corporation's return. (R. 131.) After Busby's work had been

[8] See Defendant's Exhibit 1 and Government Exhibit 4 at the suppression hearing (R. 3091, 3096), and Government's Exhibit 186 at the trial (Vol. VIII of the Record, p. 90).

[9] See Defendant's Exhibit 16 at the suppression hearing (R. 3174), and Government's Exhibit 185 at the trial (Vol. VIII of the Record, p. 89).

completed Cain notified Sauber that the figures were ready. (R. 285–286.) Cain testified that they represented "our best estimate at that time" (R. 261), and, when Revenue Agent Lima arrived at the corporation's office in the summer of 1948 to begin the audit, Busby gave him his work sheets and summary with the remark that they represented both the receipts and the disbursements "as near as they could figure" (R. 321). In February 1949 Cain was told by one of the investigating agents that criminal proceedings were possible. (R. 327–328, 331–332.) In the summer of 1949 Cain was told that the case would not be closed until respondents cooperated with the Government by revealing the persons to whom the corporation had made over-the-ceiling payments to obtain raw materials. (R. 240–241, 285–290.)

The corporation had kept an informal record of Lubben's over-the-ceiling cash payments. Some time after the revenue agents had come to the corporation's office in the summer of 1948, Cain twice directed Graflund to destroy this record, and his orders were eventually carried out.[10] (R. 785, 1743–1745.) In August 1948, and again in August 1951, Cain offered Lubben financial assistance and urged him to leave the country to

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[10] It should be noted that Judge Lindley's dissenting opinion mistakenly places this destruction of records before the beginning of the agents' audit. (Appendix, *infra*, pp. 64–66.)

avoid questioning by the agents. He admitted to Lubben that the corporation had received the overages, said that he was willing to pay the Government $450,000 personally just to get the matter cleared up, and indicated that he was attempting to settle the case through a political contact with Daniel Bolich, then Special Agent in Charge of the New York office of the Treasury Intelligence Unit. (R. 962–974, 1321–1328, 1335–1336, 1365, 2623.) The record reveals other efforts, both by Cain and by Sullivan, to have the case closed through political pressure. (R. 964, 972, 1322, 2680.)

At no time did respondents openly admit, either during the investigation or during the course of the proceedings in the courts below, that they had intentionally evaded corporate taxes. It is true that at the time of the alleged disclosure in 1948 they admitted that the corporation owed additional taxes, because at that time the Commissioner of Internal Revenue would not allow deductions for over-the-ceiling expenditures. (R. 171, 181, 207–208, 229–232.) However, that question was then pending before the courts. In December 1948 the Tax Court overruled the Commissioner and held such deductions allowable (*Sullenger* v. *Commissioner,* 11 T. C. 1076), and this was followed by a number of decisions to the same effect in the Courts of Appeals.[11] (R.

[11] The Commissioner acquiesced in these decisions shortly prior to the trial of this case. (R. 428.)

144–145, 427–428.) Accordingly, when respondents filed their pre-trial motions, they not only denied intent to evade the corporation's taxes, but they also denied that the corporation owed any additional taxes. (R. 17, 31–32.)

At the trial the Government proved by the direct evidence of Lubben and his associates and by Lubben's records that respondents had received approximately $450,000 in unrecorded and unreported cash premiums during 1945 and 1946 alone. (R. 1838–1840, 1844–1846, 2064–2066.) Although the summary submitted by respondents in connection with the alleged disclosure had showed receipt of about $380,000 in cash overages by the corporation from Lubben in 1944, 1945 and 1946 (*supra*, p. 11), and although at the disclosure hearing neither Cain nor Busby limited the receipts to any particular period (see R. 222–225), respondents Cain and Sullivan testified at the trial that the overage receipts from Lubben were confined to the period between September 1945 and August 1946, that they amounted to no more than $150,000, and that all of this had been paid out to unidentified individuals in premiums for raw materials. The defense was largely devoted to attempts to discredit Lubben and his records, and to efforts to prove that the corporation *must* have paid out large sums in overages during 1945 and 1946 in order to obtain the raw materials necessary to continue in operation.

Three employees of the corporation testified vaguely that they had made such payments (R. 1732, 1736, 1738, 1782, 1784, 1785, 2009–2014, 2017), but none of them could testify as to the amounts they had paid. None of the other numerous witnesses for the defense had knowledge of any specific amount paid out in the corporation's behalf. (R. 2038–2039, 2329, 2376, 2384, 2404, 2433, 2467, 2488, 2575, 2652, 2685.) And no witness was called to testify that he had received cash payments from the corporation.[12]

Without referring to a large part of the evidence summarized above, the Court of Appeals, with Judge Lindley dissenting, held, contrary to the district court's express findings, that respondents had "cooperated to the extent that they were able, and in complete compliance with the policy of the department." (Appendix, *infra*, p. 54.) The majority held that respondents had made a voluntary disclosure, and that the use at the trial of evidence obtained through the disclosure constituted a violation of the privilege against self-incrimination as guaranteed by the Fifth Amendment. The convictions were reversed with in-

[12] Respondent Huebner, to whom almost all of Lubben's cash payments were delivered personally and who was in charge of operation of the Shotwell plant, did not take the stand. When the sentences were about to be imposed Cain voluntarily asked the court to give consideration to the fact that all of Huebner's actions had been approved by himself and Sullivan. (R. 3013, 3016–3017.)

structions to grant the motion to suppress evidence. The majority found it unnecessary to consider numerous other alleged errors. (Appendix, *infra*, p. 59.)

REASONS FOR GRANTING THE WRIT

The opinion of the majority below assumes that a taxpayer who has made a voluntary disclosure must in good faith cooperate with the revenue agents in a determination of his correct tax liability, in order to obtain the exclusion of evidence obtained from him if criminal proceedings are instituted. (Appendix, *infra*, pp. 54–55.) The majority holds that these respondents did cooperate. Judge Lindley points out in his dissent that it is uncertain whether the majority opinion means that, as a matter of law, a partial disclosure is sufficient to bring a taxpayer within the terms of the policy; or whether it means that, as a matter of fact, there was no substantial evidence in this record to support Judge Nordbye's finding, in effect endorsed by the jury, that respondents' disclosure was completely lacking in good faith. (Appendix, *infra*, pp. 60–63.) Whichever be taken as the basis of the decision of the court below, we submit that the decision is so manifestly erroneous as to call for review by this Court.

1. As Judge Lindley says in his dissent, the majority opinion seems to hold "that any action by a taxpayer which advises a Treasury official

that a tax return previously filed by him is incorrect or incomplete * * * is a sufficient disclosure, irrespective of what facts are revealed to or concealed thereby from the government and irrespective of what roadblocks the taxpayer may thereafter erect in the way of a determination of the true facts surrounding the fraudulent return." (Appendix, *infra*, pp. 60–61.)

We agree that if a taxpayer should have voluntarily disclosed an unpaid tax liability before investigation has begun, and should thereafter cooperate in good faith in a determination of the taxes due, he would be entitled to an exclusion of the evidence thus obtained should criminal proceedings be instituted.[13] But in this case all respondents did was to present evidence of additional receipts from which it might possibly be concluded that the corporation owed additional

[13] It is highly doubtful that the exclusion of such evidence rests, as the majority below held (Appendix, *infra*, p. 59), upon the constitutional privilege against self-incrimination, since a voluntary disclosure does not involve extortion of a confession by either physical or moral compulsion. *Holt* v. *United States*, 218 U. S. 245, 252–253; *Centracchio* v. *Garrity*, 198 F. 2d 382, 388 (C. A. 1st), certiorari denied, 344 U. S. 866; cf. *United States* v. *Carignan*, 342 U. S. 36, 41. If this were the basis for the rule, there would be serious doubt of its applicability here, since the disclosure was made on behalf of a corporation which cannot claim the privilege. *United States* v. *White*, 322 U. S. 694, 699. We think confessions of this nature should be excluded under a rule of evidence. See *Centracchio* v. *Garrity*, *supra*; and cf. *United States* v. *Carignan*, *supra*, and *McNabb* v. *United States*, 318 U. S. 332.

taxes. They never admitted tax evasion, and they ultimately even denied that any taxes were owing. They filed no new, corrected tax returns. They destroyed crucial evidence. They presented fictitious evidence of corporate expenditures. They endeavored to persuade the Government's key witness to go to South America. They attempted to settle the case through political pressure. And they did not even disclose all the corporation's unreported cash receipts, for Busby's summary showed receipts of only about $380,000 in cash overages from Lubben for 1944, 1945 and 1946, whereas the Government proved approximately $450,000 for 1945 and 1946 alone. (*Supra,* p. 14.)

Furthermore, there were two reasons why it was necessary for the agents to determine what respondents had done with these receipts. If they had not, as they claimed, paid them out for raw materials, then they would obviously have been intentionally evading corporate taxes, and the 50% fraud penalty (*supra,* pp. 3–4), a civil incident of the assessment and collection of the proper tax (*Helvering* v. *Mitchell,* 303 U. S. 391, 405) and a very considerable amount in this case, would automatically have become due to the Government. Secondly, although during most of 1948 the Commissioner was disallowing black-market expenditures as deductions, the question had not yet been decided by the courts, and the

agents would have been remiss in their duties if they had failed to check the accuracy of the expenditures figures in Busby's summary. When the decision in *Sullenger* v. *Commissioner*, 11 T. C. 1076, overruled the Commissioner not long after the audit had begun (*supra*, p. 13), it became all the more necessary that the claim of deductible expenditures be thoroughly investigated in order to determine the proper amount of taxes owed by the corporation. Yet respondents consistently refused to produce any tangible evidence to support the claimed expenditures, and they have never specifically proved the payment of any money to the men they described as "faceless". Surely, to hold that in these circumstances, as a matter of law, respondents "cooperated to the extent that they were able, and in complete compliance with the policy of the department" (Appendix, *infra*, p. 54), transforms the "voluntary disclosure" policy into a device for enabling tax evaders to escape punishment, through the simple expedient of making "false statements and fraudulent representations" designed only "to mislead and to misinform the Government agents of the true facts" (Appendix, *infra*, p. 34).

This Court has held in the *Whiskey Cases*, 99 U. S. 594, that, where there is no statutory basis for a promise of immunity in return for a confession, the accused cannot hold the prosecutor to his promise; but that, if the accused *fully*

and fairly complies with his part of the bargain, he obtains equitable rights which may be enforced. We submit that that principle should be controlling here, and that nothing less than full and fair cooperation with the agents in determination of the tax due constitutes sufficient compliance with the voluntary disclosure policy to justify exclusion of the Government's evidence. The decision of the majority, if it means that a partial disclosure is sufficient, is in conflict with the holdings in *Contracchio* v. *Garrity*, 198 F. 2d 382, 389 (C. A. 1st), certiorari denied, 344 U. S. 866, and *Bateman* v. *United States*, 212 F. 2d 61, 65–66 (C. A. 9th). And it conflicts in principle with the holding in *Monroe* v. *United States*, 215 F. 2d 81, 84 (C. A. 5th), certiorari denied, 348 U. S. 914, to the effect that an alleged disclosure cannot be twisted into a trap for the Government. Cf. *Application of Henry Lustig Co.*, 67 F. Supp. 306, 310 (S. D. N. Y.), affirmed, 163 F. 2d 85 (C. A. 2d), certiorari denied, 332 U. S. 775.

The question of law involved is one of considerable importance to the revenue, for, although the policy has been abandoned, there are many pending cases in which this issue either has been, or can be raised.[14] Furthermore, the statute of limi-

[14] We are informed by the Internal Revenue Service that there are now between 60 and 70 pending cases in which the question of a voluntary disclosure made under the former policy either has been, or may be, raised as a defense.

tations will not run on the last year affected by the policy until March 15, 1957, and it is likely that some cases involving the issue will reach the Courts of Appeals as late as 1960.

2. If, on the other hand, the majority means to hold that Judge Nordbye's finding of lack of good faith was without support in the record, the decision conflicts with numerous decisions of this Court and the courts of appeals, and constitutes such an extraordinary departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. In view of the facts which we have set forth in the Statement (*supra*, pp. 8–15) there cannot be the shadow of a doubt that there was abundant evidence in the record to support Judge Nordbye's finding of "entire absence of good faith in * * * [the] alleged disclosure" (Appendix, *infra*, p. 31). True, the evidence was in conflict, but where the trial judge is required to make a finding of fact upon conflicting testimony the standard of review is the existence of substantial supporting evidence in the record. In *United States* v. *Johnson*, 327 U. S. 106, this Court reversed another split decision of the court below[15] on a similar issue, pointing out that the majority had substituted its own finding of fact for that of the trial court. This Court said (327 U. S., pp. 111–112, 113): "While the appellate

[15] *United States* v. *Johnson*, 149 F. 2d 31 (C. A. 7th).

court might intervene when the findings of fact are wholly unsupported by evidence, * * * it should never do so where it does not clearly appear that the findings are not supported by any evidence." See also *United States* v. *Johnson*, 319 U. S. 503, 518; *Delaney* v. *United States*, 263 U. S. 586, 589–590; *Helvering* v. *Kehoe*, 309 U. S. 277; *White* v. *United States*, 194 F. 2d 215, 217 (C. A. 5th), certiorari denied, 343 U. S. 930; *Alger* v. *United States*, 171 F. 2d 667, 668–669 (C. A. 7th); *Cannon* v. *United States*, 166 F. 2d 85, 86 (C. A. 5th); *Lowrey* v. *United States*, 161 F. 2d 30, 34 (C. A. 8th), certiorari denied, 331 U. S. 849; *Blodgett* v. *United States*, 161 F. 2d 47, 54–55 (C. A. 8th); *United States* v. *Nardone*, 127 F. 2d 521 (C. A. 2d); *Coupe* v. *United States*, 113 F. 2d 145, 148 (C. A. D. C.), certiorari denied, 310 U. S. 651.

The majority's substitution of its own finding of good faith in the disclosure is all the more inexplicable in view of the fact that the jury's verdict necessarily indicated that it had reached the same conclusion as had Judge Nordbye. For, while the Government proved that the corporation had received approximately $450,000 unreported income from Lubben, respondents testified that the amount was only $150,000 and that substantially all of this was passed along to the "faceless" men. If the jury had believed respondents, they would have been acquitted. Despite

the verdict of guilt, however, the majority finds that the respondents "cooperated to the extent that they were able." (Appendix, *infra*, p. 54).

Judge Nordbye found that respondents had been in no way misled by representatives of the Government. (Appendix, *infra*, p. 33.) The majority substituted its own finding on this issue also. (Appendix, *infra*, pp. 55–57.) Sauber testified that he had never assured Cain and Busby that they had made a valid disclosure. (R. 291.) Early in 1949 an agent told Cain that prosecution was possible. (R. 327–328, 331–332.) In the summer of 1949 Cain was told by Sauber that the case would not be closed until respondents cooperated. (R. 289–290.) In October 1951 Agent Wright told him substantially the same thing. (R. 240–241.) Agent Olson flatly denied that he had assured Cain in October 1951 that he had nothing to worry about. (R. 357.) Judge Nordbye's finding is clearly supported by the record.

In conclusion, it should be noted that Judge Nordbye specifically refrained from making a finding as to the timeliness of the disclosure (Appendix, *infra*, p. 34), a question as to which the evidence was in conflict. The majority below made its own finding that the disclosure was timely. (Appendix, *infra*, p. 58.) The case should at least have been remanded to permit the court of first instance to pass upon this

disputed issue of fact, if it were deemed significant.

CONCLUSION

For the reasons stated, it is respectfully submited that this case warrants further review. The petition for certiorari should be granted.

Respectfully submitted.

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OCTOBER 1955.